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IN THE

Supreme Court of the United States

October Term, 1974
No. 74-1353

WILLIAM J. KAUFMAN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1974

No.

WILLIAM J. KAUFMAN, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT

Petitioner, WILLIAM J. KAUFMAN, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above case on February 27, 1975.

OPINIONS BELOW

The District Court for the Southern District of New York rendered no opinion. The opinion of the Court of Appeals for the Second Circuit is not yet officially reported, but is unofficially reported at pages 1959-1978, slip opin. Nos. 74-2021, 74-2035 (Feb. 28, 1975); a copy thereof is appended to this petition in the Appendix at pp. A-1 - A-20.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was made and entered on February 27, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether a federal conviction for

conspiracy to defraud the United States under 18 U.S.C. §371 can stand (a) where the federal government had no interest in the subject matter of the protected transactions, (b) where the conspiracy concerned a local government agency, the employees of which were held not to be federal officials, and (c) where the Government offered no proof of knowledge by the accused of federal involvement and thus no proof of specific intent to defraud the United States.

2. Whether 18 U.S.C. §1623 and the recantation provision thereof [18 U.S.C. §1623(d)] can be applied to permit the Government (a) to preclude recantation by failing to inform a witness of his right so to do, and (b) to ask and obtain an indictment from a grand jury where the defendant had fully recanted but where the government failed to inform the Grand Jury.

STATUTES INVOLVED

1. Petitioner was convicted on one count of conspiracy to defraud the United States, pursuant to 18 U.S.C. §371, which provides as follows:

> §371. Conspiracy to commit offense or to defraud United States
>
> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

2. Petitioner was also convicted of three counts of false declarations before a grand jury, pursuant to 18 U.S.C. §1623, which provides as follows:

§1623 False Declarations Before Grand Jury or Court

(a) Whoever under oath in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

(b) This section is applicable whether the conduct occurred within or without the United States.

(c) An indictment or information for violation of this section alleging that, in any proceedings before or ancillary to any court of grand jury of the United States, the defendant under oath has knowingly made two or more declarations, which are inconsistent to the degree that one of them is necessarily false, need not specify which declaration is false if -

(1) each declaration was material to the point in question, and

(2) each declaration was made

within the period of the statute of limitations for the offense charged under this section.

In any prosecution under this section, the falsity of a declaration set forth in the indictment or information shall be established sufficient for conviction by proof that the defendant while under oath made irreconcilably contradictory declarations material to the point in question in any proceeding before or ancillary to any court or grand jury. It shall be a defense to an indictment or information made pursuant to the first sentence of this subsection that the defendant at the time he made each declaration believed the declaration was true.

(d) Where, in the same continuous court or grand jury proceeding in which a declaration is made, the person making the declaration admits such declaration to be false, such admission shall bar prosecution under this section if, at the time the admission is made, the declaration has not substantially affected the proceeding, or it has not become manifest that such falsity has been or will be exposed.

(e) Proof beyond a reasonable doubt under this section is sufficient for conviction. It shall nto be necessary that such proof be made by any particular number of witnesses or by documentary or other type of evidence.

STATEMENT

Petitioner was indicted, along with William Del Toro and Ralph Ruocco, by indictment 73 Cr. 289 WK, filed April 4, 1973 in the United States District Court for the Southern District of New York. The indictment charged, in Count One, that the defendants had conspired to defraud the United States, in violation of 18 U.S.C. §371, and in Counts Two and Three, that they had offered a bribe of $15,000 to Pedro Morales, a public official employed by the New York City Model Cities Administration, and had actually given Morales $500.00 in violation of 18 U.S.C. §§201(b) and 2. Petitioner was also charged in six counts, for having given false testimony before a grand jury, in violation of 18 U.S.C. §1623. Three of those counts were dismissed before trial.

After a two-week trial before the Honorable Whitman Knapp, United States District Judge,

and a jury, petitioner was convicted on all counts on June 11, 1974. On July 25, 1974, the judgment was entered, and petitioner was sentenced to concurrent terms of four years on each count.

Petitioner appealed the conviction to the United States Court of Appeals for the Second Circuit, which by judgment entered February 27, 1975, reversed petitioner's conviction on the bribery counts on the grounds that Morales, the Model Cities employee allegedly bribed, was an employee of the City of New York and not a "public official" within the meaning of 18 U.S.C. §201. Petitioner's conviction for conspiracy to defraud the United States was affirmed, however, as was his conviction for making false declarations before the grand jury. It is the latter portion of the Court of Appeal's judgment affirming petitioner's conviction for conspiracy and perjury of which petitioner seeks review by the Court.

Pedro Morales, the person whom petitioner was alleged to have bribed, was a corrupt Deputy Assistant Administrator in a regional office of the New York City Model Cities Administration in Harlem, and an employee of the City of New York. On September 1, 1972, Morales was arrested for accepting a part of $51,000 in bribes in connection with the administration of the Model Cities program. Morales admitted his culpability and agreed to co-operate with the United States Attorney's office for the Southern District of New York by acting as an undercover agent, while remaining on the Model Cities payroll.

In his capacity as a government agent, Morales taped conversations with petitioner, William Kaufman, a lawyer and real estate broker, who was then attempting, on behalf of the Acme-Hamilton Corporation, to sublease the Ludwig Baumann Building in East Harlem, for which

petitioner would earn a commission. These conversations occurred between September 20, 1972, and January 26, 1973. As a result of these conversations, Morales received $500.00 in cash from petitioner and was promised an additional $14,500 upon execution of a sub-lease by the City. In fact, Model Cities had no interest in or knowledge of this venture. Morales' part therein was solely for the purpose of obtaining evidence to secure the conviction of petitioner and his co-defendants.

On February 2, 1973, petitioner appeared before a federal grand jury where he initially denied having paid or offered money to Morales and made other false statements most of which he recanted right then and there in the grand jury room, admitting his involvement with Morales completely. Petitioner was warned that if he testified falsely he could be convicted of perjury. He was not informed of the recantation provision of 18 U.S.C.

§1623(d).

Immediately after testifying, Kaufman went to the office of Assistant United States Attorney Rudolph Giuliani to discuss his testimony. There, for the first time, he was informed of his right of recantation under 18 U.S.C. §1623(d), the apparent purpose of which was to preclude him from further recantation before the grand jury.

The same afternoon, petitioner's lawyer made a date with Mr. Giuliani to discuss the case at the first available moment. On Tuesday, February 6, 1973, petitioner agreed to cooperate with the government as an undercover agent and record, on tape, conversations with Del Toro and Ruocco. In return for this cooperation, it was understood and agreed that any indictment would contain a single conspiracy count, to which petitioner would be entitled to plead, and no perjury counts.

During the course of petitioner's co-operation with the government, he discussed fully his participation in the alleged scheme to defraud the United States. He also made several tapes of conversations with Del Toro and taped an important conversation with Ruocco, all of which materially aided the Government in obtaining convictions against Del Toro, Ruocco and himself. It is clear that without petitioner's cooperation Ruocco would have been neither indicted nor convicted.

Kaufman appeared before the grand jury four times between February 2, 1973 and February 23, 1973. His appearances on February 9 and February 16, 1973 were made while he was co-operating with the Government, and at those sessions he was asked no questions by the Govern-ment and made no statements himself. At his final appearance before the grand jury on February 23, 1973, while he was still unclear as to what

his position really was, he was asked only to identify his lawyer by name and excused.

During his period of cooperation Kaufman admitted his full involvement with Morales, Del Toro and Ruocco and that he had made false statements before the grand jury. It was his understanding that in view of his cooperation no perjury charges would ever be directed against him and therefore that formal recantation (which could easily have been accomplished before the grand jury) was unnecessary.

REASONS FOR GRANTING THE WRIT

A.

BY AFFIRMING PETITIONER'S CONVICTION FOR CONSPIRACY TO DEFRAUD THE UNITED STATES, THE COURT OF APPEALS ERRONEOUSLY DECIDED IMPORTANT QUESTIONS OF FEDERAL LAW WITH THE EFFECT OF ENORMOUSLY ENLARGING FEDERAL JURISDICTION FAR BEYOND WHAT CONGRESS INTENDED IN THE ENACTMENT OF 18 U.S.C. §371.

The Government's jurisdictional theory

throughout the proceedings in this case, from the indictment through appeal, was principally based upon the role of the United States Department of Housing and Urban Development ("HUD") as a source of funds for the New York City Model Cities Administration, of which Pedro Morales, the Government's informant, was an employee. Thus, in the bribery counts, the indictment alleged that Morales was a "public official" under 18 U.S.C. §201, i.e., that he was

> "a person acting for or on behalf of the United States in an official function under or by authority of [HUD]...",

and in the conspiracy count, that petitioner and his alleged co-conspirator conspired to defraud the United States, under 18 U.S.C. §371,

> "in connection with its lawful governmental functions by obstructing and hindering [HUD] in the impartial, fair and honest distribution of federal funds and by depriving the United States of the faithful and honest services of the New

> York City Model Cities Administration... funded and supervised in substantial part by [HUD]."

Contrary to the Government's arguments, the Court of Appeals held that Morales was not a "public official" under the bribery statute and that any crime of bribery which may have been committed was a crime against the State of New York, not the federal government. Thus, the Court reversed petitioner's convictions under 18 U.S.C. §201.

The principal grounds for the Court's decision was its recognition of "the enormous amount of funding by the Federal Government on a broad spectrum" (Appendix, p.A-10) and its appreciation of the fact that bringing within the ambit of federal jurisdiction all conduct illegal under State law where federal funding may be involved "'would alter sensitive federal-state relationships [and] could overextend limited

federal police resources'" (Appendix, p. A-10) [citing Rewis v. United States, 401 U.S. 808, 812 (1971)].

By sustaining petitioner's conviction on the conspiracy count, however, the Court of Appeals reversed its position and thus decided, this time contrary to the policy of this Court in Rewis v. United States, supra, that the federal courts have jurisdiction even though the most direct link between the conspiracy and any federal interests, namely Pedro Morales, was broken by the court's decision that he was not a "public official".

In Keane v. United States, 272 F. 577 (4th Cir. 1921), the court reversed defendant's conviction for conspiracy to defraud the United States arising out of transactions involving a military post exchange, an entity authorized, organized and operated by the U.S. War Department. The court held that since the post exchange

itself was not a lawful department of the federal government, not having been created by Congress,

> "Therefore this post exchange is not such an institution as that a fraud upon the United States can arise from or be involved in any transaction concerning it..." 272 F. at p. 588.

The court distinguished Haas v. Henkel, 216 U.S. 462 (1910) [cited by the Court of Appeals in support of its affirmance of petitioner's conviction for conspiracy], in which the conspiracy involved transactions directly with the U.S. Department of Agriculture, a federal agency "established by law". Haas also differs from the case at bar since, in Haas, a public official was one of the conspirators.

Like Keane, the instant case involves transactions with an entity that is not a lawful department of the United States Government (i.e., the New York City Model Cities Agency). Moreover, and unlike Keane, the Model Cities Administration

was not created by HUD or any other branch of the federal government, but was established solely by the City of New York. Thus, this is clearly a case where federal jurisdiction under 18 U.S.C. §371 is lacking on the grounds set forth in Keane.

Nor should this result be permitted to be circumvented by the Government's transparent attempt in the indictment to create federal jurisdiction by alleging transactions with a local agency (Model Cities) intended to defraud the federal agency which provides part of the financing (HUD). To sustain jurisdiction on this basis is tantamount to holding that federal jurisdiction is found anywhere that federal funds can be traced, however indirectly. In view of the vast and steadily increasing expenditures of federal funds in every state, this would give federal courts jurisdiction over conspiracies directed against almost any state agency, even

though only the state courts would have jurisdiction over any substantive offenses. This is precisely the result which the Court sought to avoid in Rewis v. United States, supra.

There is no case which has extended federal jurisdiction so far. Those few cases of federal funding of local projects where federal conspiracy convictions were upheld are demonstrably distinguishable. The basis of those decisions, that the federal government is entitled to protection from fraud, i.e., to have its programs administered honestly, cannot be disputed. In each case, however, the federal interest entitled to protection was clearly established. Precisely, the opposite is true herein. In Harney v. United States, 306 F.2d 523 (1st Cir.), cert. denied, 371 U.S. 911 (1962), for example, affirming a conviction involving a program funded by the federal government under the Federal Aid Highways

Act, Title 23 U.S.C. Sections 101 et seq., the court pointed out that approval of the Secretary of Commerce had been obtained for the specific expenditures, that funds previously apportioned had been allocated and the federal government was committed. Thus, "federal participation was not a mere vague possibility for some time in the future but an immediate practical reality with federal funds set aside." Harney, supra, at 531.

Similarly, in United States v. Loschiavo, 493 F.2d 1399 (2d. Cir. 1973) cert. denied, 43 U.S.L.W. 3212 (October 15, 1974), a conviction arising out of the same Model Cities investigation, federal funds were committed to the specific project (rental of sanitation facilities) and were ultimately expended for rent.*

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* As stated by the Government in that case on page 14 of its brief before the Court of Appeals:

In United States v. Thompson, 366 F.2d 167 (6th Cir.), cert. denied sub nom. Campbell v. United States, 385 U.S. 973 (1966), affirming a conviction based upon kickbacks on a project funded by the federal government under the Hill-Burton Act, Title 42 U.S.C. Sections 291 et seq., federal funds for the specific project had been

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> "With particular reference to the sanitation housed in Loschiavo's building, HUD specifically authorized an expenditure of federal funds ($852,600) to cover the cost of a Neighborhood Cleanup Program in the Harlem-East Harlem Model Cities area, including the rental of a sanitation facility, which the City arranged to operate through its Department of Sanitation, under HUD's guidelines concerning record keeping, documentation of costs, audits and inspections, conflict of interest, and others. Pursuant to this arrangement, HUD funded 100% of the rental due to Loschiavo for his building."

In the case at bar, it was conceded that no funds were set aside or even applied for. Appendix, pp.A-14 - A-15.

solicited and committed. The kickback was solicited and received in return for an architectural contract which was awarded following the commitment of funds. Under these circumstances, the court held (relying on dicta in Harney v. United States, supra) that it was unnecessary for the Government to prove that the United States funds were actually used to reimburse the state for the added expense incurred as a result of the kickbacks, since the United States was entitled to have its program administered "honestly and without corrupt influence." Thompson, supra, at 171.

It is in this language that Count One of the indictment in the instant case was drawn. Any reliance upon Thompson, however, to support jurisdiction, is clearly misplaced. The court in Thompson was able to avoid the difficulty of tracing funds only because the specific hospital

construction project to which the Government had committed funds had been undertaken. The project with respect to which the Government was entitled to honest administration was a specific one in which its interests were clearly established. Not so here.

We submit that this Court should not construe 18 U.S.C. §371 so broadly as to affirm federal jurisdiction over a conspiracy so local in nature and one in which the interest of the United States is so indirect and insignificant as in the case at bar. This would represent an unwarranted departure from former case law and establish a dangerous precedent which would have a devastating effect upon the "sensitive federal-state relationships" and the "limited federal police resources" which this Court has endeavored to protect.

Even if this Court were to decide, in-

spite of the foregoing, that the objective facts do not preclude a federal conviction so long as petitioner's intent were established, the conviction here for conspiracy would remain defective in the absence of proof of any "anti-federal" intent.

In cases where the conspiracy is to commit a federal crime, it is clear that while no anti-federal intent is necessary for conviction of the substantive offense, it is a prerequisite to conviction for conspiracy. See United States v. Alsondo, 486 F.2d 1339, 1342 (2d Cir. 1973), cert. granted, 416 U.S. 935 (1974)* in which the court cites from the decision of Judge Learned Hand in United States v. Crimmins, 123 F.2d 271

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* The court also held that an erroneous instruction on this issue requires reversal whether or not an exception is taken. 486 F.2d at 1344.

(2d Cir. 1941), as follows:

> "While one may, for instance, be guilty of running past a traffic light of whose existence one is ignorant, one cannot be guilty of conspiracy to run past such a light for one cannot agree to run past a light unless one supposes that there is a light to run past."
>
> 123 F.2d at 273.

Similarly, in Nassif v. United States, 370 F.2d 147, 152 (8th Cir. 1966), the court held that it is not enough to prove a conspiracy to steal and conceal without proof of an "anti-federal intent" to steal merchandise from interstate commerce.

While a conspiracy may be cognizable under 18 U.S.C.§371 which is more general in scope, i.e., a conspiracy "to defraud the United States" as alleged in the indictment herein, there is no reason why the requirement of anti-federal intent should not equally be applicable. Thus petitioner's convictions for conspiracy cannot stand unless in his dealings with Model Cities, a local entity,

and its employee, he and his co-conspirators actually intended to defraud the United States in the specific manner alleged in the indictment. It is not enough to prove an intent to subvert a local agency.

Yet, this was precisely what Judge Knapp charged. After discussing the conspiracy count at length, nowhere mentioning jurisdiction or saying anything about defendant's own understanding of what governments were involved, Judge Knapp charged:

> "In the conspiracy count all you must find in this regard is that the object of the conspiracy was to some extent to subvert the Model Cities Program, and hence the objectives of the United States, by depriving Model Cities, and hence the United States, of Mr. Morales' unprejudiced judgment regardless of whether he technically fitted the definition of public official as I have defined that term to you." Tr. 1523, lines 17-24.

It does not follow, merely because federal funds find their way to the Model Cities Program in

the normal course, that if the object was to subvert the local program it was also to subvert a branch of the federal government. This is only true where the conspirators are aware of this fact and had such specific intent. There was no proof at all to this effect. The court's failure to so charge renders the convictions defective.

B.

BY AFFIRMING PETITIONER'S CONVICTION FOR MAKING FALSE STATEMENTS BEFORE THE GRAND JURY, THE COURT OF APPEALS ERRONEOUSLY DECIDED IMPORTANT QUESTIONS OF FEDERAL LAW, NOT SETTLED BY THIS COURT AND UPON WHICH THE CIRCUIT COURTS HAVE NOT RULED DECISIVELY. IF THIS DECISION STANDS, THE RECANTATION PROVISION OF 18 U.S.C.§1623(d), INSTEAD OF INDUCING TRUTH THROUGH THE KNOWLEDGE THAT ONE MAY THEREBY AVOID PROSECUTION, WILL HAVE EXACTLY THE OPPOSITE EFFECT.

Before petitioner appeared to testify before the grand jury on February 2, 1973, the Government already had sufficient evidence to obtain an indictment, having had in its possession tape recordings of conversations made during the period

from September 20, 1972, to January 26, 1973, between Morales, the undercover agent, and each of the persons ultimately indicted, including petitioner.

Instead of using petitioner's appearance before the grand jury to further its investigative purposes, however, it would appear that the Government merely used this opportunity to add to petitioner's already pending indictment additional counts under 18 U.S.C. §1623, while at the same time effectively foreclosing any possibility of recantation. Such conduct by the Government flies in the face of the clear intent of Congress when it passed the recantation measure in 1970 to encourage truthful testimony before a grand jury by permitting prompt recantation. 2 U.S. Code Cong. & Adm. News p.4024 (1970).

1. Failure to reveal the existence of the tape

At no time prior to or during the appearances of petitioner and Del Toro before the grand jury did the Government reveal the tape recordings of their conversations with Morales. This omission may have been motivated by the Government's desire to add perjury counts to any proposed indictment. Regardless of the motivation, however, it is crystal clear that it in no way advanced the knowledge of the grand jury with respect to their investigation. The possibility that it was done simply to manufacture more counts for an impending indictment was raised by Judge Knapp at trial.*

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* After characterizing the perjury count as "outrageous" Judge Knapp stated to the Assistant United States Attorney at trial,

> "These people were not taken to the grand jury for the purpose of getting information out of them; they were taken to the grand jury for the sole purpose of getting them to lie." [Tr. 445, lines 21-24].

And later, continuing his colloquy with the Assistant

While there may be "no duty upon the prosecution to inform a witness, even a potential defendant, of the testimony of other witnesses before the grand jury", United States v. Winter, 348 F.2d 204, 210 (2d Cir.), cert. denied, 382 U.S. 955 (1965) (emphasis supplied), there should be a duty to disclose to a potential defendant the

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United States Attorney, Judge Knapp said,

> "... that was your purpose in putting him before the grand jury, and I think that is an outrage, and I think it is high time that the Courts put a stop to it."
>
> "If the defendants had made a motion I would have dismissed this case and let the Court of Appeals either reverse or not. I can't do that now."
>
> "But as I say, as a practical matter, your sole purpose in putting him before the grand jury was to get him to lie and use that as an influence." [Trial Transcript, p.425, line 18 - p.453, line 2].

existence of recordings of his own conversations before he testifies before a grand jury, particularly where, as here, it would have avoided false statements and encouraged his cooperation with the United States Attorneys' Office. This is clearly the law where candid disclosures, such as those which should have been made by the Government here, could not hamper or impede the grand jury investigation.

2. Failure to inform the grand jury of petitioner's effective recantation

Immediately subsequent to his first appearance before the grand jury, having only then been informed of his right to recantation (see argument B3, infra), petitioner fully admitted his culpability to an Assistant United States Attorney, openly and clearly admitting that his declarations before the grand jury were false. Although the facts support a defense of recantation,

the indictment was returned on counts of false declarations. This indictment, of at least the perjury counts, was voted by the grand jury in whole or in part because the Government failed to inform them that the recantation had been made. Petitioner was neither given the opportunity, nor was he led to understand that it would be necessary for him to inform the grand jury of his recantation. In fact, the Government's promise to allow him to plead to a single conspiracy count, coupled with his cooperation and recantation, had quite the opposite effect - to lead him to believe that no statement was necessary.

Section 1623(d) of Title 18 of the United States Code provides that:

> "Where, in the same continuous court or grand jury proceeding in which a declaration is made, the person making the declaration admits such declaration to be false, such admission shall bar prosecution under this section if, at the time the admission is made, the declaration

> has not substantially affected the proceeding, or it has not become manifest that such falsity has been or will be exposed."

That each of the elements of the above provision were met in this case cannot be the subject of serious dispute.

First, petitioner's admission of the falsity of the declarations is apparent from his subsequent cooperation with the Government, as discussed above, including his participation as an agent in taped conversations with Del Toro and Ruocco, during which he made specific statements on tape which directly contradicted his false statements to the grand jury.

Second, the admissions were made in the same continuous grand jury proceeding in which the false statements were made. Petitioner initially appeared before the grand jury on February 2, 1973, and subsequently made three other appearances before

the grand jury (on February 9, 16 and 23, 1973). His admissions, which were made during his co-operation with the Government, began on February 6, 1973, and continued until a few days prior to his last appearance on February 23, and thus were clearly made during the grand jury investigation. Indeed, the grand jury proceeding involving him continued until April 4, 1973, when he was indicted.*

---

* Short shrift may be made of any suggestion that, since petitioner did not make these admissions directly to the grand jury, he did not make his admissions "in the same continuous grand jury proceedings" as required by the statute. Petitioner was not questioned further by the Government about his involvement with Morales or Del Toro at his three subsequent appearances before the grand jury, nor did he made any statements to them concerning his false declarations. Neither petitioner nor the Government believed that further statements were necessary for an effective recantation. In fact, it was the Government's position that no further testimony was necessary because, in exchange for petitioner's cooperation, there would be no perjury counts in any indictment against him. It is sufficient that both sides at the time believed that the admissions had been made and acted according to that belief. Here, as in United States v. Crandall,

Third, petitioner's false statements had not substantially affected the grand jury proceeding by the time that he admitted their falsity, since his cooperation with the Government began on Tuesday, February 6, 1973, four days after he made the statements the previous Friday and as soon as it was practicable for him to do so. The grand jury did not meet again to consider petitioner's case until the following Friday, February 9, 1973, by which time the admissions had been made. Moreover, it is inconceivable that the false statements would have had any effect,much less a substantial or material one, since the Government already possessed tape recorded conversations contradicting

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363 F.Supp.648,654 (W.D.Pa. 1973), aff'd mem., 493 F.2d 1401, aff'd mem., 495 F.2d 1369 (3d Cir.), cert. denied, __U.S.(1974), the admissions were made "during the continuity of the original grand jury and *** the statement afforded to the government was equivalent to having been made in the grand jury proceeding." As in Crandall, the Government did not recall the witness "although very apparently they had the ability and [petitioner's] consent to do so." (Crandall, supra at 654.)

petitioner's denials before the grand jury.

Fourth, it had not become "manifest" to petitioner that the falsity of his statements had been or would be exposed when he admitted their falsity. The recantation provision of Section 1623 cannot be applied, consistently with its purpose, unless it is interpreted to allow a reasonable time for reflection and recantation after the witness knows it is possible to do so. To conclude that it was "manifest" to petitioner prior to this time that his statements would be exposed as false and therefore that recantation is not available is not only unsupportable but represents as well a position wholly in conflict with the purpose the statute seeks to achieve. In fact, it is apparent that petitioner did exactly that which the statute was intended to encourage by his admissions and decision to cooperate with the Government.

Such recantation cannot and should not be

vitiated by the Government's failure to inform the grand jury thereof.* If this Court allows petitioner's conviction to stand without further review, the effect may well be to negate much of what Section 1623 (d) was intended to do.

3. Failure to inform petitioner of the recantation provision until after his first appearance before the grand jury

The issue of the Government's duty to inform a witness of his right to recant is a

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*The Government's failure to inform the grand jury both of petitioner's admissions and his cooperation, which constituted vital exculpatory material is also a violation of due process rendering the indictment totally defective. See: ABA Project on Standards for Criminal Justice, Commentary on the Standards Relating to the Prosecution Function (Approved Draft 1971) at §3.6 Commentary, p.89; United States v. Geller, 154 F.Supp.727 (S.D.N.Y. 1957) [which indicates, by implication, that an indictment may be rendered fatally defective by the failure of the Government to disclose defendant's recantation to the grand jury, where such recantation would operate as a matter of law, to purge his initial false statements].

difficult one, of substantial importance, upon which this Court has not yet ruled. Only two circuit courts have wrestled with the problem, the Second Circuit deciding against such a duty [United States v. Cuevas, No. 74-2110 (2d Cir. February 10, 1975)] and the Third Circuit going both ways in two decisions, coming out against the duty, but with a significant dissent by the author of the original decision. [United States v. Lardieri, 497 F. 2d 317 (3d Dir. 1974), on rehearing, remand withdrawn and judgment affirmed, 506 F.2d 319 (3d Cir. 1974)].

It is petitioner's view, relying upon the initial decision in Lardieri and upon Judge Weiss' dissent on rehearing, that the Government had in this case an affirmative obligation to inform petitioner that a recantation provision existed before it could effectively foreclose any

recantation and charge him with perjury. United States v. Lardieri, supra, 497 F.2d at 321. This is particularly necessary where, as here, the Assistant United States Attorney repeatedly warned petitioner during his appearance before the grand jury of the severe penalties for perjury, but did not tell him until later on, in the Assistant's office, that by correcting his false statements promptly he could bar prosecution for perjury under the recantation provision. The initial Lardieri decision indicates that under such circumstances a witness must know of the possibility of recantation before he can be prosecuted for perjury. At the very least, petitioner must have had a reasonable time after he was informed of the existence of a recantation provision following his appearance before the grand jury before it can be said that he was foreclosed from using it. It is beyond argument that he recanted fully almost immediately

after he heard the recantation statute read to him for the first time.

It follows from the foregoing that Judge Knapp's charge on recantation was clearly erroneous,* since he assumed that any attempt by petitioner to recant failed and that as a matter of law the defense of recantation was not available to him, even though the facts strongly support the conclusion that petitioner made an effective re-

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* "Finally, you have heard a fair amount of argument about so-called recantation. As to that I'll simply advise you as matter of law that if you find the testimony of any defendant or any of them to have been willfully false under the rules that I have laid down to you then nothing that either of these defendants said or tried to say either before the Grand Jury or elsewhere would give them a legal defense under the doctrine of recantation. However, in considering the question of whether any testimony you may find to have been false was willfully so, you may consider any conduct of the defendants, of either defendant, either before the Grand Jury or subsequently in the offices of the United States Attorney or indeed anywhere else which you find has a legitimate bearing on the question of willfulness."
(Tr. 1531, 1538).

cantation under the circumstances.

Unless this Court decides once and for all the serious questions raised by the differing interpretations given the recantation provision of 18 U.S.C. §1623 in the Circuit Courts, the effect of the statute will remain at best uncertain. At worst, it will enable federal prosecutors to manufacture perjury counts, to foreclose a witness before the grand jury from availing himself of the recantation defense and thus to thwart rather than further the investigative purpose of federal grand juries.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 395, 396—September Term, 1974.

(Argued November 15, 1974 Decided February 27, 1975.)

Docket Nos. 74-2021, 74-2035

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

WILLIAM DEL TORO
and WILLIAM KAUFMAN,

Defendants-Appellants.

Appellants were convicted by a jury before Hon. Whitman Knapp, United States District Judge for the Southern District of New York of the crimes of bribing a federal public official in violation of 18 U.S.C. § 201, of conspiracy to defraud the United States of its lawful functions in violation of 18 U.S.C. § 371, and of several counts respectively of making false declarations in violation of 18 U.S.C. § 1623. The Court of Appeals held, Gurfein, *Circuit Judge,* that the person "bribed," an employee of New York City, was not a federal "public official" within the meaning of Section 201 and that the conviction on the substantive counts must be reversed. The Court held further that a conspiracy to defraud the United States was proved, and that the contention of appellant Kaufman that he was improperly convicted of the crime of making a false declaration because of his alleged recantation is rejected and

the false declaration convictions, as well as the conspiracy conviction, are affirmed.

JACOB W. FRIEDMAN, New York, N.Y. (Marc Hermelin, New York, N.Y., on the brief), *for Defendant-Appellant Del Toro.*

HAROLD BAER, JR., New York, N.Y. (Guggenheimer & Untermyer, James V. Morgan, and Bruce J. Berman, New York, N.Y., of counsel), *for Defendant-Appellant Kaufman.*

EDWARD J. KURIANSKY, Assistant United States Attorney, Southern District of New York (Paul J. Curran, United States Attorney, and John P. Flannery, II, Lawrence S. Feld, and John D. Gordan III, Assistant United States Attorneys, Southern District of New York, of counsel), *for Appellee United States of America.*

Before:

FRIENDLY, FEINBERG and GURFEIN,

Circuit Judges.

GURFEIN, *Circuit Judge:*

Appellants William Del Toro and William Kaufman were convicted of conspiracy, bribery and perjury after a two week trial before Judge Knapp and a jury. They challenge their conviction on several grounds in this appeal. We affirm in part and reverse in part.

The indictment charged appellants and a third defen-

dant, Ralph Ruocco,[1] with conspiracy to defraud the United States, in violation of 18 U.S.C. § 371, and with bribing a public official, in violation of 18 U.S.C. §§ 201(b) and 2. In addition, each individual defendant was charged with several counts of perjury, in violation of 18 U.S.C. § 1623.

The jury found Kaufman guilty of conspiracy, bribery and on three counts of perjury. Three other counts had been dismissed by the court before trial on the ground that Kaufman had effectively recanted his false testimony within the terms of 18 U.S.C. § 1623(d) during his testimony before the Grand Jury. He was sentenced to concurrent terms of four years on each count.

The jury found Del Toro guilty of conspiracy, bribery and on five counts of perjury. He was acquitted on a sixth count of perjury; a seventh had been dismissed at the close of all the evidence. He was sentenced by Judge Knapp to concurrent terms of a year and one day on each count.

Evidence introduced by the Government allowed the jury to find that Del Toro and Kaufman had conspired to bribe Pedro Morales, Assistant Administrator of the Harlem-East Harlem Model Cities Program. Kaufman, a lawyer and a real estate broker, hoped that Morales would use his official position to secure for Kaufman a lease by Model Cities of significant office space in one of the buildings for which Kaufman was the renting agent. The benefit to Kaufman would be a lucrative commission. Del Toro, the Executive Director of an East Harlem anti-poverty agency, Massive Economic Neighborhood Development, Inc. (MEND), acted as a middle man in the transaction.

The first meeting between Kaufman and Morales occurred during late August, 1972, as a result of a chance

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1 Ruocco pleaded guilty to the conspiracy count and testified for the government.

conversation between Del Toro and Morales in Morales' office. Morales mentioned to Del Toro that he had been charged with the duty of finding office space for a new branch of Model Cities. Del Toro stated that space was available in the Ludwig-Baumann building, where MEND offices had previously been located, and that he knew Kaufman, the rental agent. Several days later, Del Toro telephoned Morales to say that Kaufman was at the MEND offices. Morales joined Del Toro at MEND offices, met Kaufman, and discussed the possibilities of leasing office space with both men. At one point, Morales told Kaufman that to secure the lease, Kaufman would have to pay a 10 per cent commission as a bribe. Kaufman indicated that he knew he might have to pay a bribe and would think it over.

On September 1 Morales was arrested by the United States Attorney's Office on charges of conspiracy and receipt of bribes relating to a different matter, a Model Cities summer camp program. Morales admitted his complicity and agreed to assist in a joint federal-city undercover investigation into official corruption in the Model Cities Administration. Thereafter, Morales, while retaining his job with Model Cities, aided investigators by tape recording conversations with various individuals who continued to perceive him as a corrupt administrator. Among those individuals were Kaufman and Del Toro.

On September 20 Kaufman dropped in at Morales' office at a time, when, by chance, Morales happened to be wearing concealed recording equipment in connection with another investigation. Morales recorded his conversation with Kaufman, in which the two discussed the possibility of the renting of space in the Ludwig-Baumann Building by Model Cities. Kaufman assured Morales that a mutually lucrative deal could be worked out in detail. When Morales stated that his superior would want money "up

front," Kaufman stated that he usually operated on trust with people, but he did not refuse out of hand to supply front money. Kaufman also noted that they would have to build up a business record of their transaction to conceal the payoff.

On October 26 Morales recorded a conversation with Del Toro in which Del Toro offered to help Morales come to an agreement with Kaufman, who had not gotten in touch with Morales since their September 20 meeting.

On October 30 Morales met with Kaufman at Del Toro's office, as Del Toro had arranged, and the conversation was recorded. Del Toro was not present. Kaufman told Morales that the owners of the building had agreed to pay Morales $15,000 if he could arrange for Model Cities to rent the space and that the payoff would be disguised as a part of Kaufman's commission agreement. Kaufman would make his payment to Morales once the commission had been paid to Kaufman. In response to Morales' expressed fears of a double-cross, Kaufman stated that he would not jeopardize his continuing good relationship with the City personnel by deceiving Morales.

Thereafter, Morales had a series of meetings both with Del Toro and Kaufman which were recorded. In such meetings, Del Toro demonstrated specific knowledge of the transactions between Kaufman and Morales and urged Morales to trust Kaufman. He also agreed to help Morales secure front money from Kaufman. In meetings with Kaufman, Kaufman assured Morales that money would be forthcoming once serious negotiations on the lease had begun.

In the meantime, Kaufman had informed Ralph Ruocco, assistant to the President of Acme-Hamilton, the New Jersey corporation which owned the Ludwig-Baumann Building, that it might be necessary to bribe Model Cities officials in order to secure the lease. On November 14

Kaufman and Ruocco, on behalf of Acme-Hamilton, signed a commission agreement which included inflated percentage payments to Kaufman, out of which he would make payments to the officials. In January, Kaufman succeeded in getting a check for $500 from Ruocco, who had purportedly gotten approval from his superior, the President of Acme-Hamilton. On January 26 at a prearranged meeting, Kaufman paid the $500 in cash to Morales and urged him to press forward with arrangements for the lease. Kaufman later told Ruocco that the money had been paid to Morales.

The perjury counts against Kaufman

On February 2, 1973, Kaufman appeared before the Grand Jury, where he was advised of his constitutional rights and of the fact that he was a target of their investigation. After having denied complicity in any corrupt activities, Kaufman was shown boxes of tape recordings. He then admitted that Morales had asked him for money, but denied offering or paying any bribes.

Thereafter, Kaufman met with the Assistant United States Attorney conducting the grand jury investigation, who reminded him of his constitutional rights and then read to him the perjury statute, drawing his attention to the recantation provision and to the proviso that a recantation can no longer be made once the perjury has become manifest. The Assistant then told Kaufman about the tapes of his conversations with Morales, after which Kaufman admitted offering a bribe to Morales. He continued to deny that he actually paid the $500.

The Assistant and Kaufman then entered into an exchange in which Kaufman indicated that he would be willing to tape conversations with officials of Acme-Hamilton in return for a deal with the Government. Denied his request

for full immunity, and informed that he would have to plead guilty to a felony, Kaufman decided to consult an attorney.

On February 6 Kaufman and his lawyer met with the Assistant and, after some discussion, Kaufman agreed to cooperate with the Government and to plead guilty either to conspiracy or to perjury. He now admitted paying the $500 to Morales and revealed his discussions and arrangements with Ruocco. During the subsequent, brief period of cooperation, Kaufman himself tape recorded two conversations with Ruocco, in which Ruocco indicated his knowledge of the bribery transactions and implicated his superiors at Acme-Hamilton. Kaufman was twice called to appear before the Grand Jury thereafter to adjourn his subpoena, but he did not testify.

On February 16 Kaufman again asked for full immunity or for a chance to plead to a gratuity count in return for his continued cooperation. Informed that this arrangement would be impossible, Kaufman withdrew from his agreement to cooperate with the Government. He appeared once more before the Grand Jury, but failed to testify further on advice of counsel. Kaufman also warned Ruocco by telephone that they were under investigation, and suggested that they meet to work out a coherent story.

Del Toro Perjury

In the meantime, Del Toro had appeared before the Grand Jury on February 16, where, after being informed of his rights and of the fact that he was a target of the investigation, he denied knowing of any offer or payment to Morales and participating in any way in the transaction. He admitted only that he thought Model Cities would be paying Kaufman a brokerage fee and that he was aware that payoffs were not uncommon among public officials. In a second appearance before the Grand Jury on February

23, Del Toro declined to change his earlier testimony. He did admit that he had introduced Kaufman and Morales and had been present at their first meeting, but claimed he had been in a different part of the room when they talked.

I

Both appellants contend that their convictions on the substantive counts, two and three, for violation of 18 U.S.C. §§ 201(b)2 cannot stand, and that their conviction on the conspiracy count, count 1, must also be reversed. We agree with their contention on the substantive counts. We disagree with respect to the conspiracy count.

18 U.S.C. § 201(b)(1) provides that whoever gives or promises anything of value to any "public official" with intent to influence any official act is subject to fine and imprisonment. Kaufman and Del Toro were convicted under § 201(b).[2]

"Public official" is defined in Section 201(a), in pertinent part, as an "officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof, including the District of Columbia, in any official function, under or by authority of any such department, agency or branch of Government."

"Official act" is there defined as "any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by

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2 Section 201(c)(1) correlatively subjects to fine and imprisonment the "public official" who corruptly receives or agrees to receive anything of value in return for being influenced in his performance of any official act.

It is also a crime under 18 U.S.C. § 201(b)(2) for the briber to make the gift or promise to the public official to influence him to commit or aid in committing or collude in or allow, any fraud, or make opportunity for the commission of any fraud on the United States. There is a correlative provision in 201(c)(2). The case was tried on the theory only of "official act" under subsection (1) and the court charged only "official act." In any event, under either subsection it would be necessary to find that the person bribed was a "public official."

law be brought before any public official, in his official capacity, or in his place of trust or profit."

Appellants raise the point that Morales, who was a city employee, was not a "public official" nor capable of performing an "official act" within the meaning of the statute.

The trial judge had some reasoned hesitation on the point but concluded that "a close legal question ought to be decided in favor of the Government so it can be reviewed." He accordingly denied the defense motions to dismiss, and charged the jury as follows. After telling the jury that in order to convict they must find that Kaufman promised Morales $15,000 and that "the purpose of the promise was to influence him, Morales, in an official act, namely, to induce him to make a favorable recommendation that would induce Model Cities to lease the Ludwig-Baumann Building," he proceeded to explain the third element of the offense "that Morales was a public official."

On this, the trial judge charged as follows:

> "Official, of course, means an official of the United States. We have no jurisdiction in this Court over the bribery of any other officials. That in turn has been defined by statute as one who is acting for or on behalf of the United States or any agency thereof.
>
> "Now, you have heard the testimony of Mr. Torres to the general effect that the United States government had determined to implement certain of its social and government objectives by financing certain state or city agencies, one of which was Model Cities, of which Mr. Morales was a deputy director. You will recollect what Mr. Torres said about the extent to which the United States through HUD, Housing and Urban Development, supervised Model Cities' activities and that the United States paid 100% of the cost

of Model Cities' program and 80% of its salaries including, of course, Mr. Morales'.

"The salaries were actually paid by the city but through monies advanced by the government, according to Mr. Torres' testimony. On the basis of such testimony you may conclude that Mr. Morales was: 'Acting for or on behalf of the United States or an agency thereof,' and that he was a public official within the meaning of the statute."

The jury was permitted to convict on the substantive counts on the theory that, although Morales was a city employee, he could be found to be a federal "public official" because the federal government financed certain city agencies like Model Cities by paying 100% of the cost of its program and 80% of its salaries through a grant to the City, and because HUD supervised Model Cities' activities to some extent.

In view of the enormous amount of funding by the Federal Government on a broad spectrum which includes welfare, housing and health, we are constrained to take a close look at the determination below and the effect of bringing clearly illegal conduct under state law within the ambit of the federal jurisdiction.

It seems to us that a healthy regard for the federal system of divided powers, as well as for the still accepted doctrine that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity," *Reivis* v. *United States,* 401 U.S. 808, 812 (1971), compels a close scrutiny. In discerning Congressional intent we may consider whether an expansive interpretation of the statute "would alter sensitive federal-state relationships [and] could overextend limited federal police resources." *Reivis, supra,* 401 U.S. at 812.

Turning to the question of ambiguity, we write on a comparatively clean slate, for there are no decisions holding city employees like Morales to be federal "public officials." Cases cited to this point by the Government are inapposite.

In *United States* v. *Levine,* 129 F.2d 745 (2 Cir. 1942) the Market Administrator was appointed directly by the Secretary of Agriculture, and in turn appointed the defendant who was bribed to use his influence to stave off investigations under the federal statute. In *Harlow* v. *United States,* 301 F.2d 361, 370 (5 Cir. 1962) the post exchanges were themselves direct instrumentalities of the United States and its employees were "acting for the United States."

Cases cited under the federal fraud statutes are different because they involved obtaining *federal* funds by fraudulent means, see *United States ex rel. Marcus* v. *Hess,* 317 U.S. 537; *United States* v. *Candella,* 487 F.2d 1223 (2 Cir. 1973), *cert. denied,* 415 U.S. 977 (1974), a direct injury to the federal government.

Our first inquiry then is whether Section 201 on its face takes in a person in the status of Morales as a federal "public official." The Government relies on the phrase "acting for or on behalf of the United States in any official function." It places no emphasis on the modifying phrase "under or by authority of any such department, agency or branch of Government."

We do not believe that Morales was acting "under or by authority of any such department, agency or branch" of the federal government. He was a city employee, carrying out a task delegated to him by his superior, another city employee. If his superior had accepted Morales' recommendation, the decision to move Model Cities' offices to the Ludwig-Baumann Building would still have had to be passed on by the City Department of Real Estate, the

Corporation Counsel, and the Board of Estimate. Only after all these agencies had approved would the request for funding have been made by the City to HUD. There were no existing committed federal funds for the purpose.

We would have to strain to find a Congressional intention to include Morales as a federal "public official" in these circumstances.

We think, moreover, that Congress, by a process of exclusion, has shown a contrary intention with respect to persons like Morales. A broader look at the bribery and related statutes shows this.

18 U.S.C. § 203 includes within the prohibitions against bribery "a special Government employee"—essentially, as defined in Section 202, a short-term employee.

When the Public Health Service Statute was enacted, it subjected to the provisions of 18 U.S.C. § 203 "any State officer or employee who is assigned to the Department (HEW) without appointment." 42 U.S.C. § 246(7)(A). Thus, even when there was an actual interchange of personnel with the states as provided in 42 U.S.C. § 246(f)(1) et seq., Congress thought it necessary to make the state employee subject to the bribery statutes by special reference—an unnecessary reference if he would be broadly read to be "acting for or on behalf of the United States" under 18 U.S.C. § 201 or § 203 in any case.

Indeed, in 1971, in formulating the Government Organization Statute, Congress specifically provided, 5 U.S.C. § 3374, for every "executive agency", in which HUD is included, that "(a) an employee of a state or local government who is *assigned* to an executive agency under an arrangement under this subchapter . . . (c) during the period of assignment, a state or local government employee *on detail* to an executive agency . . . (2) is deemed an employee of the agency for the purpose of . . . sections

203, 205, 207, 208, 209, 602, 603, 606, 607, 643, 654, 1905 and 1913 of Title 18. . . ." (Emphasis added).[3]

If Section 201 is given the broad reading of the court below, there is no need for the earlier Public Health or later Government Organization statutes. Whether we consider the statutory treatment as an expression of contrary Congressional intent, however, or as simply a contribution to the ambiguity of Section 201, we hold that, in the circumstances of this case, Morales was not a federal "public official" and that it was reversible error to permit the jury to find that he was.

We note in passing that we reject appellants' alternative theories that even if Morales was a federal "public official" his mere recommendation would not be sufficient to constitute an "official act." See *United States* v. *Carson*, 406 F.2d 424, 433 (2 Cir. 1973); as well as their contention that because, at least with respect to Count 3, Morales was an undisclosed undercover agent, his status negated the concept of bribery. See *United States* v. *Rosner*, 485 F.2d 1213, 1228-29 (2 Cir. 1973), *cert. denied*, 417 U.S. 950 (1974).

II

When we turn to the convictions on the conspiracy count we are not under the constraint of interpreting a particular substantive statute. The conspiracy charged here was within the federal criminal jurisdiction. The indictment alleged, *inter alia*, that the defendants conspired "to de-

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3 Significantly, in prohibiting political activity by state and local employees there is no requirement that the local employee be "assigned" to the federal agency. In the context of prohibition of political activity, as distinguished from bribery, the definition is broad. A " 'state or local officer or employee' means an individual employed by a state or local agency whose principal employment is in connection with an activity which is financed in whole or in part by loans or grants made by the United States or a federal agency. . . ." 5 U.S.C. § 1501.

fraud the United States and its departments and agencies in connection with the performance of its lawful governmental functions by obstructing and hindering the United States Department of Housing and Urban Development in the impartial, fair and honest distribution of federal funds and by depriving the United States of the faithful and honest services of employees of the New York City Model Cities Administration which was, at all times relevant to this indictment, funded and supervised in substantial part by the United States Department of Housing and Urban Development."

The essence of the conspiracy was the corrupt agreement to defraud the United States in the performance of its lawful governmental functions. On this charge there is no need to find Morales a federal public official. And Judge Knapp correctly explained that to the jury.[4] Here the conspiracy might never achieve its objective, but that would not be a determining factor. An agreement that might defraud the federal government in its functions at some time in the future, followed by an overt act, makes out the conspiracy charged. It is not necessary that the agreement be to defraud the Government out of money, *Haas* v. *Henkel*, 216 U.S. 462 (1910); *United States* v. *Jacobs*, 475 F.2d 270 (2 Cir.), *cert. denied sub nom. LaVelle* v. *United States*, 414 U.S. 821 (1973), but only to impede its lawful functions.

While some of the conspiracy cases cited by the Government are easier than this case because federal money had actually been set aside, *Harney* v. *United States*, 306

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4 The court charged that "in the conspiracy count all you must find in this regard is that the object of the conspiracy was to some extent to subvert the Model Cities program, and hence the objectives of the United States, by depriving Model Cities, and hence the United States, of Mr. Morales' unprejudiced judgment regardless of whether he technically fitted the definition of public official as I have defined that term to you."

F.2d 523, 531 (1 Cir. 1962) or applied for, *United States* v. *Thompson*, 366 F.2d 167 (6 Cir. 1966), we do not think the difference to be substantial. The conception that a criminal conspiracy has been formed is less restrictive than whether an "attempt" has gone far enough to make the act charged a criminal act.

III

Kaufman contends that his conviction on the perjury counts (false declaration) under 18 U.S.C. § 1623 is legally deficient in two respects. He contends first that the prosecutor should never have taken him before the Grand Jury knowing that he was a potential defendant without revealing in advance that Morales had secretly taped conversations with him at the instance of the government. Kaufman contends, moreover, that the government failed to live up to its obligations by not informing the Grand Jury that he had recanted, before permitting the Grand Jury to indict him for making false declarations.

Kaufman cites no authority in support of the first proposition. His argument is that the prosecution is under a duty to inform a prospective defendant that there are recordings of his own criminal conduct, distinguishing cases where the testimony of other witnesses was not disclosed. *United States* v. *Winter*, 348 F.2d 204, 210 (2 Cir.) *cert. denied*, 382 U.S. 955 (1965). Judge Weinfeld's discussion in *Winter*, speaking for this court, lays the point to rest. There is no duty on the prosecution to tell a Grand Jury witness what evidence it has against him or to give him repetitive warnings that it is his duty to tell the truth when he has sworn upon his oath to tell the truth. It is not an unfair dilemma to put upon a prospective defendant to require him to claim privilege or to tell the truth. Though Kaufman was not in custody, he was given the *Miranda* warnings.

We do not condone the use of the Grand Jury for the sole purpose of preparing an already pending indictment for trial, see *United States* v. *Dardi*, 330 F.2d 316, 336 (2 Cir. 1964), and there may be situations in which no indictment has yet been filed where this stricture would apply. In this case, however, there was a continuing investigation into possible corrupt practices of Model Cities personnel and some who dealt with them. Kaufman could have been a valuable witness for the Government, see *United States* v. *Sweig*, 441 F.2d 114, 121 (2 Cir.), *cert. denied*, 403 U.S. 932 (1971), as indeed he tried to be in his period of cooperation after his perjury.

The second contention concerning his alleged recantation is also without merit.

In 1970, Congress in enacting the Organized Crime Control Act included a section relating to false declarations before a grand jury or court, Pub. L. 91-452, Title IV ¶ 401a, 84 Stat. 932. That section, 18 U.S.C. § 1623, addressed itself to the problems of recantation. Congress provided:

> "Where, in the same continuous court or grand jury proceeding in which declaration is made, the person making the declaration admits such declaration to be false, such admission shall bar prosecution under this section if, at the time the admission is made, the declaration has not substantially affected the proceeding, or it has not become manifest that such falsity has been or will be exposed." 18 U.S.C. § 1623(d).[5]

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5 The Supreme Court in *United States* v. *Norris*, 300 U.S. 564 (1937), had held that "the telling of a deliberate lie by a witness completes the crime defined by law." (§ 125 of the U.S. Criminal Code; R.S. 5392; 18 U.S.C. § 231), and that a prompt recantation does not excuse the perjury though it may demonstrate that there was no wilful intent to swear falsely. 300 U.S. at 576.

In *People* v. *Ezaugi*, 2 N.Y.2d 439 (1957), the Court of Appeals put a severe limitation on the famous rule of *People* v. *Gillette*, 126 App.

The purpose was obviously to induce the witness to give truthful testimony by permitting him voluntarily to correct a false statement without incurring the risk of prosecution for doing so. 2 U.S. Code Cong. & Adm. News p. 4024 (1970).[6]

Kaufman appeared before the Grand Jury on February 2, 1973. He was advised of his privilege against self-incrimination and that he was a target of the Grand Jury investigation. After he gave what the Assistant United States Attorney believed to be perjurious testimony, he was warned that he might be subject to a perjury prosecution, and asked whether "in light of that warning" he wished to change his testimony. Kaufman said no. When the Assistant conspicuously put some boxes of tape recordings on the table, Kaufman said he would like to change his testimony and admitted that Morales had asked him for money. He continued to deny, however, that he had offered Morales $15,000, that he had paid Morales $500 and that he had discussed the matter with Del Toro. These denials, among others, were the basis for the false

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Div. 665 (1908), holding that the *Gillette* rule applied only "when no reasonable likelihood exists that the witness has learned that his perjury is known or may become known to the authorities." 2 N.Y.2d at 443. This made the New York recantation rule stricter than *Gillette*, but more liberal than the federal rule of *Norris*. The rule of *Ezaugi* was codified in 1967 to provide that in any prosecution for perjury, it is an affirmative defense that the defendant had retracted his false statement in the course of the proceeding in which it was made. . . . before it became manifest that its falsity was or would be exposed." N.Y.L. 1965, c. 1030, Penal Law § 210.25.

Section 1623(d) was adapted in modified form from the New York Penal Code, Section 210.25. See 2 U.S. Code Cong. & Adm. News, 1970, pp. 4023-24; Hearing and Reports of the Committee on the Judiciary, S. 30 (1969). The New York Statute codified the ruling in *People* v. *Ezaugi*, *supra*. In the New York statute the retraction is made an "affirmative defense."

6 Section 1621, the general perjury statute, has no recantation provision.

declaration counts on which Kaufman was convicted in Counts 12, 13 and 16.[7]

After this first Grand Jury session, Kaufman went to the office of the United States Attorney where he talked with several assistants, recanting some of the perjury that day, and the balance on February 6, 1973 after consulting counsel. Having agreed to become a cooperating witness for the Government and himself to wear a tape recorder in further pursuit of crime, he later balked at wearing a tape recorder in a proposed conversation with the president of the company which owned the Ludwig-Baumann building on the obviously silly excuse that the latter was an honest person who knew nothing of Kaufman's illicit relation with Morales.[8]

Kaufman argues that the failure of the prosecutor to tell the Grand Jury that he had confessed to the substantive crime and conspiracy—for that is what his "recantation" meant—bars his prosecution for perjury.

Kaufman appeared before the Grand Jury three times after the purported recantation in the United States Attorney's office. On apparent advice of counsel he made no effort himself to recant before the Grand Jury. We need not decide whether Kaufman still had a chance to recant his perjury or whether his perjury had by then been made manifest, for he failed to use his own opportunity to recant before the Grand Jury in any event.

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7 Counts 11, 14 and 15, based on Kaufman's initial denials of having any knowledge of corruption in Model Cities and of having been asked for or having discussed money with Morales, were dismissed prior to trial with the Government's consent, in view of Kaufman's recantation and admission during his Grand Jury appearance that he had in fact been asked for money by Morales.

8 The real basis for the breakdown of further cooperation was presumably the Government's refusal to grant Kaufman immunity in return for his cooperation.

In fact, his "recantation," made in piecemeal fashion, was part of a plea bargaining process which could not have taken place before the Grand Jury, and which was hardly the type of recantation considered by Congress in enacting the section.

Kaufman makes the additional argument that the prosecutor unfairly cut off his recantation "right" by making his perjury "manifest" as soon as he left the Grand Jury for the first time. However, the prosecutor's placing of boxes of tape recordings on the table in the Grand Jury room should have indicated that the time for recantation had come, or at least, did not have long to run. Kaufman thereupon simply made one grudging admission, but he failed to recant his denial that he had bribed and agreed to bribe Morales. Moreover, as indicated, Kaufman later appeared before the Grand Jury again but made no effort to tell it the truth. Under the circumstances, the claim that his "right" to recantation was unfairly cut off is without merit.

There was no need to warn appellant of his "right" to recant, as we have recently held. *United States* v. *Cuevas*, —— F.2d ——, slip op. 1719, No. 577, Sept. Term 1974 (Decided Feb. 10, 1975); *United States* v. *Lardieri*, 497 F.2d 317, 321 (3 Cir. 1974), on rehearing, remand withdrawn and judgment affirmed, —— F.2d —— (3 Cir. Dec. 18, 1974) slip op. No. 73-1750.[9]

Nor was there any need, as appellant contends, for the prosecutor to notify the Grand Jury of his "cooperation." He quotes from the Commentary on the Standards Relating to the Prosecution Function (1971) that "a prosecutor should present to the grand jury evidence which would reasonably tend to negate the guilt of the accused. . . ."

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9 In view of our conclusion there is no need to consider whether the point is waived by failure to move prior to trial. See *United States* v. *Kahn*, *supra*, 472 F.2d at 283 n.9.

A guilty person who "cooperates" does not negate his guilt thereby. It is commonplace that punishment is for the court, not the jury, grand or petit.

IV

Del Toro contends that the use of Kaufman's Grand Jury testimony violated the rule of *Bruton* v. *United States*, 391 U.S. 123 (1968), since Kaufman did not testify. Though appellant argues that "the recantation involving Del Toro" was read to the jury, no transcript reference is given, nor could any be found. In the Grand Jury testimony of Kaufman there is no inculpatory statement regarding Del Toro. Hence *Bruton* is not applicable. *United States ex rel. Nelson* v. *Follette*, 430 F.2d 1055, 1058 (2 Cir. 1970); *United States* v. *Deutsch*, 451 F.2d 98, 116 (2 Cir. 1971), *cert. denied*, 404 U.S. 1019 (1972); *United States* v. *Trapiano*, 418 F.2d 1069, 1080-81 (2 Cir. 1969), *cert. denied*, 397 U.S. 1021 (1970).

We have examined the other claims of error and found them without merit.[10]

The conviction on counts 2 and 3 is reversed, as to both appellants. The conviction on the other counts is affirmed as to both appellants.[11]

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10 Del Toro's claim of entrapment is frivolous. The initial meeting between Kaufman and Morales was arranged by Del Toro and he was told by Kaufman to carry the message to Morales that Kaufman would split $50,000 less taxes with Morales in exchange for the lease. All this occurred before September 1, 1972, the time when Morales was arrested and began to act as a government undercover agent.

11 We have noted Kaufman's argument that there is a serious disparity in sentences on convictions from Model Cities corruption, with Kaufman's sentence by far the most severe. We do not exercise appellate review on the sentencing judge's discretion, but we call the judge's attention, not only to the reversal of the substantive counts, but also to the disparity, for his consideration if a Rule 35 motion is made.